In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-796

MICHAEL STEPHEN MCCORMICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of having knowingly possessed marihuana, in violation of 21 U.S.C. 844. He was sentenced to one year in the custody of the Attorney General on condition that he serve six months in a jail or treatment type institution followed by a period of probation. The court of appeals affirmed (Pet. App. 10-23).

Petitioned here contends solely that the stop and search of the vehicle in which he was a passenger were invalid. The essential facts bearing on this issue are set forth in the opinion below at Pet. App. 11-12.

493-250—73

The van in which petitioner was riding was stopped at a regular Border Patrol highway checkpoint near Truth-or-Consequences, New Mexico, some 98 miles from the Mexican border. Two Border Patrol and Customs agents approached the van. When, standing outside the van, Agent Goad asked the two occupants about their citizenship, he noticed what appeared to be a large black tarpaulin in the back of the van. Agent Ford, standing on the passenger side of the vehicle, detected the odor of marihuana from within the van.[1] He directed Goad to inspect the vehicle to see what was under the "big plastic bag" in the rear of the van.

When Goad entered the van, he attempted to lift a plastic "beanbag" type chair, capable of concealing two aliens. He felt an object about one-foot long wrapped in cellophane, which he described to Ford. Ford then tried to lift the chair and discovered a brick of marihuana. The driver and petitioner were thereupon placed under arrest, and a further search revealed some 164 bricks of marihuana weighing about 1,400 pounds; the packaging on some of the bricks had apparently torn and "leaked" marihuana.

Although the court of appeals noted that 8 U.S.C. 1357 (a)(3) empowers immigration officers to search any vehicle for aliens within a reasonable distance of an external boundary of the United States even in the absence of a warrant or of probable cause, the present case does not turn on the validity of that statute. As

[1] Ford had smelled marihuana about 100 times before (Pet. App. 16).

the court below held, the van was lawfully stopped at a permanent Border Patrol checkpoint, and the officers' observations thereafter gave them probable cause to conduct a search. Apart from whether Agent Goad had probable cause to search under the plastic for concealed aliens (Pet. App. 11–12, 16), as the court below held, Agent Ford had probable cause to believe that the van contained illicit marihuana and was therefore justified in searching it (Pet. App. 16–19).[2]

In *Almeida-Sanchez* v. *United States*, No. 71–6278, certiorari granted, 406 U.S. 944, this Court will consider the constitutionality of 8 U.S.C. 1357(a)(3).[3] Since the search and seizure in the present case were sustained on the basis of a finding that the Border Patrol agents had probable cause for their action, we submit that there is no reason to defer action on the

[2] Agent Ford had observed that the van approached the checkpoint erratically and that the driver was acting strange and appeared nervous; he smelled marihuana; and he noticed a large plastic object in the rear of the van (Pet. App. 16).

[3] The agents in this case were initially concerned about the citizenship of the visible occupants (see Pet. App. 11), without regard to 8 U.S.C. 1357(a)(3). Under 8 U.S.C. 1357(a)(1), immigration officers are authorized "to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States * * *." It has been held that this authority—which is not at issue in *Almeida-Sanchez*—justifies brief stops of vehicles for the purpose of questioning the occupants. *United States* v. *Montez-Hernandez*, 291 F. Supp. 712, 714–715 (E.D. Cal.); cf. *Wilson* v. *Porter*, 361 F. 2d 412 (C.A. 9). Having lawfully stopped the van and having detected the odor of marihuana, Agent Ford could properly search the vehicle for the presence of the marihuana. *Fernandez* v. *United States*, 321 F. 2d 283 (C.A. 9); cf. *Johnson* v. *United States*, 333 U.S. 10, 13.

present petition until the Court decides *Almeida-Sanchez*. Under settled principles, a search of a vehicle may be conducted on a public highway without a judicial warrant if the officers have probable cause at the time of the search to believe the vehicle contained contraband. See *Carroll* v. *United States*, 267 U.S. 132.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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